(1)

Supreme Court, U.S.
FILED

992067 JUN 21 2000

OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

PAUL MAY,
Petitioner,

v.

NORM HAND and
YAMHILL COUNTY,
Respondents.

On a Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Stephen L. Brischetto
OSB #78156
Counsel of Record
1001 S. W. Fifth Avenue,
Suite 1300
Portland, Oregon 97204
503-223-5814
Counsel for Petitioner

---

60 pp

QUESTIONS PRESENTED FOR REVIEW

Plaintiff, an 18 year County employee, claims he was terminated from his employment because he ran for office in a non-partisan election in opposition to the successful candidate. The lower courts held that plaintiff was a "policymaker" who could be lawfully terminated without violating the First Amendment.

1. Does the balancing test of Pickering v. Board of Education, 391 U.S. 563 (1968) apply to First Amendment claims of a County employee in a Sheriff's office terminated because the he ran for Sheriff against the successful candidate in a non-partisan election.

2. May an elected Sheriff require "political loyalty" of a County employee under the Elrod-Branti exception to the First Amendment, when the Sheriff is not a "hiring authority" for the County, when the Sheriff does not have authority to terminate County employees, when the County has adopted policies guaranteeing it's employees freedom from retaliation for political activity on non-work time and when the County has policies and practices giving it's employees a property interest in their positions.

LISTING OF PARTIES

The caption of the case contains the parties to the proceeding in the court whose judgment is sought to be reviewed.

TABLE OF CONTENTS

PAGE

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

Facts 3

Proceeding Below 7

REASONS FOR GRANTING THE PETITION 11

I. The Questions Presented in this Case Are Important 11

II. The Question of Whether the Pickering Balancing Analysis or the Elrod-Branti Exception Applies to Claims of Public Employees Terminated for Speech in Election Campaigns Has Split the Circuit Courts 12

III. The Ninth Circuit's Decision in this Case Was Erroneous 16

CONCLUSION 20

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

Branti v. Finkel, 445 U.S. 507 (1980) 8, 11, 13, 19

Burns v. County of Cambria, 971 F.2d 1015, 1023 (3rd Cir 1992) 16

Dickeson v. Quarberg, 844 F.2d 1435, 1442 (10th Cir 1988) 16

Elrod v. Burns, 427 U.S. 347 (1976) 8, 11, 13, 19

Fazio v. City and County of San Francisco, 125 F.2d 1328 (9th Cir 1997) 9, 10, 15

Finkelstein v. Bergna, 924 F.2d 1449, 1453 (9th Cir 1991) 15

Jenkins v. Medford, 119 F.3d 1156, 1164 (4th Cir 1997) 14

Jones v. Dodson, 727 F.2d 1329, 1335 (4th Cir 1984) 14

Joyner v. Lancaster, 815 F.2d 20, 23 (4th Cir 1987) .. 14

McBee v. Jim Hogg County, Tex., 703 F.2d 834 .. 15, 16

Meek v. County of Riverside, 982 F. Supp. 1410 (C.D. Cal. 1997) 15

O'Hare Truck Service v. Northlake, 518 U.S. 712, 135 LEd2d 874 (1996) 16-18

Pickering v. Board of Education, 391 U.S. 563 (1968) ..... i, 8, 14

Terry v. Cook, 866 F.2d 373 (11th Cir 1989) 16

Thomas v. Carpenter, 881 F.2d 828, 831 (9th Cir 1989) 14

Upton v. Thompson, 930 F.2d 1209, 1282, reh'g denied, 938 F.2d 84 (7th Cir 1991) 16

IN THE SUPREME COURT OF THE UNITED STATES

PAUL MAY, *Petitioner*

v.

NORM HAND and YAMHILL COUNTY,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Paul May respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App., *infra*, 1a) is unreported. By order entered March 24, 2000, the Ninth Circuit denied the petition for rehearing and

suggestion for rehearing en banc (App., *infra*, 10a). The opinion of the district court (App., *infra*, 12a) is unreported.

JURISDICTION

On January 7, 2000, the United States Court of Appeals for the Ninth Circuit entered its memorandum opinion in this case. On March 24, 2000, the United States Court of Appeals for the Ninth Circuit entered its order denying Paul May's petition for rehearing and suggestion for rehearing en banc. The jurisdiction of this Court is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the

jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Facts

Paul May commenced employment with Yamhill County in 1979. In his 18 years of service, he was successively employed as a Deputy, a Sergeant, a Lieutenant, and a Captain.

To obtain his promotion to Lieutenant, he went through a competitive process, was promoted by the Yamhill County Board of Commissioners, served a year long period of probation and became a permanent employee in the Lieutenant's position. Subsequently, the Board of County Commissioners reclassified his Lieutenant's position into that of a Captain.

In 1996, Mr. May ran for election to the office of Yamhill County Sheriff. His opponent was Norm Hand, a management level employee of the McMinnville Police Department. In Oregon, election to the Sheriff's Office is non-partisan.

Captain Larry Hailey was also employed in the Yamhill County Sheriff's Office. Mr. Hand approached Captain Hailey before the election and sought his support. Mr. Hand told Hailey that he had heard Mr. May had attempted to get Captain Hailey fired but then Sheriff Lee Vasquez stopped Mr. May from doing so. Hailey spoke directly to Mr. May, personally investigated Mr. Hand's statements and concluded that what Mr. Hand reported to him was not accurate. Subsequently, Captain Hailey threw his support to Mr. May, writing letters to the editors of local newspapers, posting lawn signs and going door-to-door speaking to citizens on Mr. May's behalf.

The election was conducted in November, 1996. Norm Hand prevailed in the election and took office in January, 1997.

On February 20, 1997, then Sheriff Hand asked to meet with Captains Hailey and May. Sheriff Hand advised Captains Hailey and May that he intended to reorganize the office, eliminating their positions, and that they would be terminated effective March 31, 1997. Moments after the meeting with Mr. May and Mr. Hailey, Mr. Hand met alone with Mr. May and informed him that he was filing an election law complaint against Mr. May.

Mr. Hand's motives in eliminating the Captain positions of Mr. May and Mr. Hailey were apparent to County officials. Mr. Hand told one Yamhill County Commissioner that he did not want Mr. May anywhere in the organization because of a comment Mr. May's

wife had made in a local grocery store. The comment inferred that Mr. May would run for Sheriff again in four years.

Upon learning he was to be terminated, Mr. May retained an attorney who wrote to the Board of County Commissioners seeking an investigation of Mr. Hand's proposed action. Mr. Hand initially took the position he wanted Mr. May and Mr. Hailey out of the Sheriff's organization completely. However, two Yamhill County Commissioners declined to approve Hand's proposed action unless Hand offered Mr. May and Mr. Hailey meaningful positions within the Sheriff's organization.

Mr. Hand responded, initially, by offering both Mr. May and Mr. Hailey clerical positions as computer technicians. When Mr. May and Mr. Hailey rejected the clerical work, Mr Hand offered them employment as corrections officers.

Although Mr. May and Mr. Hailey were dissatisfied with the offer, they accepted the positions, reserving their rights to contest the legality of their terminations.

On March 31, 1997, Mr. May and Mr. Hailey were terminated from their employment. On April 1, 1997, Yamhill County hired both individuals to work as corrections officers. Mr. Hand's recommended offer of employment was approved by the Yamhill County Board of Commissioners.

In Yamhill County, employees working in the Sheriff's Office are County employees hired by the Board of County Commissioners, not the Sheriff.

Yamhill County employment policies and practices apply to County employees in the Sheriff's Office. Among the County policies that apply to employees of the Sheriff's Office, the County has adopted an ordinance giving all County employees a right to a hearing before, and a final decision from, the County Commissioners concerning any proposal to discipline or discharge the employee. Yamhill County has a practice extending over a period of twenty years of requiring just cause to terminate an employee.

The County has adopted a policy statement permitting employees to engage in political activity on non-work time to the maximum extent permissible under the law without fear of reprisal. Historically, employees in the Sheriff's Office have campaigned for election as Sheriff against each other. Indeed, the County's attorney told employees of the Sheriff's office that they were protected from retaliation if they ran for political office because County policy prohibited their removal from office without just cause.

There is no evidence in the record that any of these employment policies and practices have caused difficulty for, or disruption to, the operation of the Sheriff's Office.

Proceeding Below

Mr. May filed a complaint in the U.S. District Court alleging that he was terminated from his position as Support Services Captain and denied promotional opportunities because he ran for public office. Mr. May alleged that Sheriff Hand and Yamhill County breached an employment contract with plaintiff by terminating him from his position as Captain without just cause. He also alleged that he maintained a property interest in his employment as Captain which could only be terminated for cause arising by virtue of verbal promises, County policies, and County practices[1]. Mr. May claimed that his termination deprived him of the benefit of his property interest without due process of law. Petitioner's complaint was filed against Norm Hand, Sheriff of Yamhill County and Yamhill County. The jurisdiction of the District Court was invoked under 28 USC §1343 and 28 USC §1331. Jurisdiction of the state contract claim was invoked under 28 USC §1367.

Defendants filed for summary judgment on the grounds that: 1). Assuming Petitioner was terminated and denied promotion because he ran for election, his position as a Support Services Captain was a "policymaking" position under this court's decision in

---

[1]Mr. May amended his complaint adding an age discrimination claim. The district court granted summary judgment against the claim. Petitioner did not appeal the dismissal of the age discrimination claim.

Elrod v. Burns, 427 U.S. 347 (1976) and Branti v. Finkel, 445 U.S. 507 (1980); 2). Under Elrod-Branti, Petitioner's termination and any promotion denial was permissible under the First Amendment; and, 3). Petitioner's evidence was insufficient to show the existence of a contract, a statute, a County regulation or policy which created a property interest in his employment and which could only be terminated for cause.

On the First Amendment claim, Petitioner argued that the balancing test set forth in Pickering v. Board of Education, 391 U.S.563 (1968) applied to Petitioner's speech in an election campaign. Since respondents failed to produce evidence of any governmental interest which outweighs Petitioner's interest in commenting on matters of public concern, Petitioner argued the summary judgment motion should be denied.

On the Fourteenth Amendment claim Petitioner pointed to verbal promises, County policies and admissions from County managers to establish that his employment could be terminated only for just cause.

The district court granted Sheriff Hand and Yamhill County's Motion for Summary Judgment on the First Amendment claim, holding: 1). Generally, a public employee's claim for violation of the First Amendment is analyzed under Pickering v. Board of Education, 391 U.S. 563 (1968), however "policymaker" employees are excluded from First Amendment protection under this Court's decisions in Elrod v. Burns, 427 U.S. 347 (1976) and Branti v. Finkel,

445 U.S.507 (1980); 2). Under the Ninth Circuit's decision in Fazio v. City and County of San Francisco, 125 F.2d 1328 (9th Cir 1997), the court conducts a functional analysis of the duties of the position, considering whether the position includes vague or broad responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders to decide if the position is a policymaking position; and, 3). Applying the Fazio factors to Petitioner's duties, Petitioner was a policymaker who could be terminated for his political opposition to Mr. Hand in the election, as a matter of law.

The district court also granted Sheriff Hand and Yamhill County's Motion against the Due Process and breach of contract claims holding that Mr. May's evidence was insufficient to show the existence of a contract of employment, a statute, or a County regulation or policy which granted plaintiff a property interest in his Captain position which could only be terminated for cause.

The district court denied the motion for summary judgment against the First Amendment promotion claims concluding that the promotions plaintiff sought were not "policymaker" positions. Thus, the Elrod-Branti exception did not apply to those promotions.

At trial of the promotion claims, the district court excluded evidence of, and also instructed the jury it could not consider, Sheriff Hand's motives in terminating plaintiff from his Captain position. The jury returned a verdict in favor of defendant's on the promotion claims.

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit. In a memorandum decision by Circuit Judges Goodwin, B. Fletcher and Tashima, the Ninth Circuit Court of Appeals concluded although the Elrod-Branti cases concerned employees terminated for partisan political affiliation, the Ninth Circuit's decision in Fazio v. City and County of San Francisco, 125 F.2d 1328 (9th Cir 1997) extended the Elrod-Branti exception to "political loyalty" cases, e.g., where an employee runs for election against his supervisor. The Ninth Circuit Court of Appeals concluded that the Fazio decision required dismissal of Mr. May's First Amendment claim.

On the breach of contract and Due Process claims, the Ninth Circuit declined to determine whether the district court erred in deciding Petitioner's breach of contract and Due Process claims. Even if Mr. May were an employee who could only be fired for "just cause", the panel reasoned, the determination that Mr. May could be terminated under the First Amendment as a "policymaker" effectively resolved his breach of contract and Due Process claims.

Paul May filed a Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied

on March 24, 2000.

REASONS FOR GRANTING THE PETITION

I. The Questions Presented in this Case Are Important

This case concerns an 18 year public employee with a claimed property interest in his position who was informed that County policy prohibited terminations because of an employee's political activity; who ran for public officer and, who was terminated because he ran for election as Sheriff in a non-partisan public election.

Mr. May's case raises two significant questions under First Amendment law: 1) Whether this court's partisan political affiliation decisions, Branti v. Finkel, 445 U.S. 507 (1980) and Elrod v. Burns, 427 U.S.347 (1976), extend to cases involving public employees terminated for speech in a non-partisan election, what the circuit courts have referred to as "political loyalty" cases; and, 2). If Elrod-Branti applies to such political loyalty claims, whether evidence that the elected official has neither hiring nor firing authority; evidence that the hiring authority (in this case the County) has adopted policies and practices giving employees property interests in their positions; evidence that the hiring authority has adopted policies guaranteeing County employees freedom from retaliation for supporting candidates in elections; evidence that these same County policies have been in effect for over twenty years without causing any difficulty for, or

disruption of, the Sheriff's Office; and, evidence that the employee in question, Mr. May, filled a County position, not a position of the Sheriff, creates an issue of fact as to whether a political affiliation requirement is a reasonable one for the position in question.

At present, the circuits' courts are divided as to whether the Elrod-Branti exception applies and, over how to apply Elrod-Branti, to claims such as Petitioner's. National uniformity is necessary because of the vital importance of free, democratic and informed electoral processes. This case involves fundamental questions of who may participate in elections to public office, what those participants may say in such elections and whether those participating in such elections may do so free from retaliation at work for their speech in election campaigns.

II. The Question of Whether the Pickering Balancing Analysis or the Elrod-Branti Exception Applies to Claims of Public Employees Terminated for Speech in Election Campaigns Has Split the Circuit Courts.

The First Amendment issues that Paul May raises in this Petition are issues that have divided the Courts of Appeals resulting in conflicting opinions between the circuits and conflicting panel opinions within the circuits.

Twenty-four years ago, a divided Court first held that the First and Fourteenth Amendments are violated by the politically motivated discharge of non-civil

service employees because of the employees nonaffiliation with a newly elected sheriff's political party unless the employees are "policymaking" employees. Elrod v. Burns, 427 U.S.347, 375 (1976). Four years later, in Branti v. Finkel, 445 U.S.507 (1980), this Court explained and narrowed the policymaking employee exception in two respects. First, the Branti opinion at two points described the issue posed as whether an employees "private political beliefs" (as opposed to public political beliefs) interfere with the discharge of the employees public duties. Branti, *supra*, 445 U.S.at 526, 517. Second, the Court acknowledged that the exception does not apply to all policymaking positions and stated that the

> "...ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."

Branti, *supra*, 445 U.S.at 518.

Following Elrod and Branti the circuit courts have struggled with the question of whether the Elrod-Branti "policymaker" exception is limited solely to cases of public employees terminated for their "private political beliefs" or extends to cases of public employees terminated for running for election in opposition to the successful candidate.

The decisions of the United States Court of Appeals for the Fourth Circuit are a prime example of the divisions within circuits on this issue. In Jones v. Dodson, 727 F.2d 1329, 1335 (4th Cir 1984), an "interim" Sheriff and a dispatcher claimed they were fired for political affiliations and expressive conduct. The Fourth Circuit Court of Appeals concluded that the Elrod-Branti exception was limited to discharges "solely for patronage reasons." If a discharge was motivated by overt speech in a political campaign, the court found, then the general First Amendment balancing test articulated in Pickering v. Board of Education, 391 U.S.563 (1968) applied, not the Elrod-Branti policymaker exception. Three years after Dodson, the Fourth Circuit again applied Pickering balancing to the claim of a Captain terminated by the Sheriff for political activity. Joyner v. Lancaster, 815 F.2d 20, 23 (4th Cir 1987). Thirteen years later, the Fourth Circuit, *en banc*, applied Elrod-Branti, rather than Pickering balancing, to claims of Deputy Sheriffs alleging they were fired for supporting the Sheriff's election opponent. Jenkins v. Medford, 119 F.3d 1156, 1164 (4th Cir 1997). While the Jenkins *en banc* court applied the Elrod-Branti exception to political loyalty claims, the opinion did little to clarify Fourth Circuit law. Five judges endorsed the court's majority opinion and five judges dissented.

The opinions within the Ninth Circuit on the applicability of Elrod-Branti to "political loyalty" claims are also seriously divided. In Thomas v. Carpenter, 881 F.2d 828, 831 (9th Cir 1989), the Ninth Circuit applied Pickering balancing to the First Amendment claims of

a Sheriff's Lieutenant who alleged he was retaliated against for challenging the Sheriff in a non-partisan election. Similarly, in Finkelstein v. Bergna, 924 F.2d 1449, 1453 (9th Cir 1991), in a case where a prosecutor claimed he was suspended for statements made in an election campaign, the Ninth Circuit stated that the prosecutor's position was unimportant to the straightforward application of the general rule prohibiting discharge of public employees for protected speech. At least one district court within the Ninth Circuit has concluded that the Thomas and Finkelstein decisions require application of Pickering balancing to claims of public employees terminated for speech in election campaigns. Meek v. County of Riverside, 982 F. Supp. 1410 (C.D. Cal. 1997). Notwithstanding it's decisions in Thomas and Finkelstein, a more recent Ninth Circuit decision has applied Elrod-Branti to such claims with little explanation for the apparent departure from the court's earlier decisions. Fazio v. City and County of San Francisco, 125 F.2d 1328, 1332 (9th Cir 1997).

The United States Court of Appeals for the Fifth Circuit *en banc* has specifically rejected application of the Elrod-Branti analysis to "political loyalty" claims. In McBee v. Jim Hogg County, Tex., 703 F.2d 834, *vacated and remand'd*, 730 F.2d 1009 (5th Cir 1984), the Fifth Circuit Court of Appeals *en banc* found that the Pickering balancing analysis applied to the claims of three Sheriff's Deputies fired for campaigning for the Sheriff's opponent. The Fifth Circuit rejected a panel decision that Elrod-Branti extended to employment decisions based upon "support of and loyalty to a

particular candidate as distinguished from a political party." McBee, *supra*, 703 F.2d at 838, n. 1.

The Third, Seventh, Tenth and Eleventh Circuit Courts of Appeals have attempted to apply the Elrod-Branti analysis to decide claims of Sheriff's Office employees alleging they were terminated for speech involved in elections. The circuits have struggled with how to apply Elrod-Branti yielding plainly inconsistent results. *See*, Burns v. County of Cambria, 971 F.2d 1015, 1023 (3rd Cir 1992) holding that law was clearly established that an elected sheriff could not terminate a Chief Deputy, his substitute, and other deputies for supporting the sheriff's opponent; Upton v. Thompson, 930 F.2d 1209, 1282, *reh'g denied*, 938 F.2d 84 (7th Cir 1991) holding that deputy sheriffs may be terminated for campaigning for the losing candidate; Dickeson v. Quarberg, 844 F.2d 1435, 1442 (10th Cir 1988) holding sheriff could not terminate the head jailer and a special deputy for their political association with the prior sheriff; Terry v. Cook, 866 F.2d 373 (11th Cir 1989) holding sheriff may terminate deputies for failing to support him in an election.

III. The Ninth Circuit's Decision in this Case Was Erroneous.

Finally, and most significantly, the decision of the United States Court of Appeals for the Ninth Circuit in this case was erroneous. This Court's recent decision in O'Hare Truck Service v. Northlake, 518 U.S. 712, 135 LEd2d 874 (1996) demonstrates the Ninth Circuit's error when it failed to apply Pickering

balancing to Petitioner's claims. In O'Hare, this Court discussed Elrod-Branti as cases limited to claims based solely upon political affiliation:

> "Elrod-Branti involved instances where the raw test of political affiliation sufficed to show a constitutional violation, without the necessity of any inquiry more detailed than asking whether the requirement was appropriate for the employment in question. There is an advantage in so confining the inquiry where political affiliation alone is concerned, for one's beliefs and allegiances ought not to be subject to probing or testing by government."

O'Hare, *supra*, 135 LEd2d at 882. Emphasis Added.

"[A] different, though related inquiry ..." is called for when "a government employer takes adverse action on account of an employee or service provider's right of free speech. There, we apply the balancing test from Pickering." O'Hare, *supra*, 135 LEd2d at 882.

When political affiliation and free speech issues are intermixed in a case, the Court made clear that Pickering balancing must be conducted.

> "A reasonableness analysis will also accommodate those many cases...where specific instances of the employee's

> speech or expression, which require balancing in the Pickering context are intermixed with a political affiliation requirement. In those cases, the balancing Pickering mandates will be inevitable."

O'Hare, *supra*, 135 LEd2d at 882.

There is little room to doubt, in this case, Mr. May's free speech rights are at the core of his complaint. He ran for public office, opposed Mr. Hand in public debates, and ultimately was terminated for doing so.

Similarly, there is little room to doubt that application of the Pickering balancing test, rather than the Elrod-Branti exception, would have yielded a different result in the lower courts. On the summary judgment motion, Sheriff Hand and Yamhill County presented no evidence that Mr. May's protected speech impaired discipline or harmony among co-workers, had a detrimental impact on close working relationships, impeded the performance of Mr. May's duties or interfered with the regular operation of the Sheriff's Office.

Both the district court and the Ninth Circuit Court of Appeals erred in failing to apply Pickering balancing to Petitioner's claims; and, both courts should have denied the motions because Respondents failed to make any showing of entitlement to summary judgment under Pickering.

If the Elrod-Branti analysis applies to claims such as Petitioner's, the second question presented in this case is equally important and the Ninth Circuit's decision equally erroneous.

The Ninth Circuit, and the district court, ignored two important limitations on the Elrod-Branti exception. First, both Elrod and Branti concerned non civil service employees. Elrod, *supra*, 427 U.S.at 351; Branti, *supra*, 445 U.S.at 509. This Court has never stated that the exception created by these two cases extends to claims of public employees with a property interest in their employment.

Second, to prove an exception to the First Amendment's protection, the "hiring authority" must present evidence that a political affiliation requirement is a reasonable requirement for the position in question. Branti, *supra*,445 U.S.518.

These two limitations on the Elrod-Branti exception make commonsense. The purpose of the exception is to insure that "representative government is not undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate. Elrod, *supra*, 427 U.S.at 367. An elected official who has no hiring and firing power, or an official who must follow civil service rules created by others to hire and fire, has no ability to hire individuals who are politically loyal to the candidate, and thus, no need for such a requirement.

In this case, Petitioner presented evidence that Sheriff Hand was not a hiring authority, that Petitioner was not an "at will" employee, and that Petitioner's employer, Yamhill County, had policies and procedures which guaranteed employees the right to engage in political activity in non-work hours free from reprisal.

The district court and the Ninth Circuit declined to consider Petitioner's evidence in deciding whether political affiliation was an appropriate requirement for Petitioner's position. Instead, both courts limited their consideration to evidence of the duties of the position.

It makes little sense to say that a County employee employed by the Board of County Commissioners in a County that disclaims any interest in employees political activity outside of work hours and that assures County employees due process protections against discharge owes a duty of political loyalty to an elected official who is not the employee's hiring authority. The very protections the County has created and the fact that the County has assumed to itself hiring authority necessarily shows that Petitioner is not a "policymaker" for the **Sheriff**. If the Elrod-Branti analysis applies, this Court should conclude that plaintiff's evidence is sufficient to create an issue of fact as to whether a political affiliation requirement is an appropriate one for the position in question.

CONCLUSION

For the foregoing reasons, Petitioner requests

that the Court grant the petition for certiorari, reverse the order granting summary judgment on the First Amendment claim and remand for trial of the claim, reverse the order affirming the jury's verdict on the promotion claims and affirming the summary judgment on the breach of contract and Due Process claims[2] and remand to the Ninth Circuit for consideration of Petitioner's appellate issues raised on those claims.

Respectfully submitted,

Stephen L. Brischetto
Counsel of Record
1001 SW Fifth Avenue, Suite 1300
Portland, OR 97204
(503) 223-5814
Counsel for Petitioner

---

[2]Remand of the breach of contract and Due Process claims is appropriate because the Ninth Circuit, based on it's disposition of the First Amendment claim, declined to decide the issues Mr. May raised on appeal on the contract and due process claims. Remand of the order affirming the jury's verdict is appropriate because evidence concerning plaintiff's termination was excluded from the jury based on the assumption that plaintiff could be lawfully terminated from his Captain position as a policymaker.